IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15137 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UMA SHARMA & CO. (DELHI) PVT.LTD.
Versus
SARDAR SAROVAR NIGAM LTD. AND OTHERS

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Appearance :
MR SV RAJU with MR CHETAN PANDYA for the Petitioner
RULE NOT RECD BACK for Respondent(s) : 1,
RULE SERVED for Respondent(s) : 2 - 6.
MR AD OZA for Respondent(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 03/12/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

1. This petition, under Article 226 of the Constitution, challenges the decisions of the Officers of the Sardar Sarovar Nigam Limited in accepting the petitioner's offers for Tender No.1 and Tender No.6 made on 8th and 9th April 2004 beyond the validity period of the offers and also prays for a direction to the respondents to refund the Earnest Money Deposit to the tune of Rs.35.31 lacs, given by way of Fixed Deposit Receipts and Bank Guarantees with interest @ 12% p.a. from the due date of payment.

2. The petition was admitted on 6th December 2004 and after hearing the learned counsel for the parties and after considering the reply of the respondents on merits, this Court (Coram: Hon'ble Mr.Justice R.K.Abichandani and Hon'ble Mr.Justice K.A.Puj) had passed an interim order, directing the respondents to pay one-half of the total amount paid by the petitioner towards Earnest Money Deposit by way of Bank Guarantees and Fixed Deposits within 4 weeks on petitioner's furnishing the Bank Guarantee for such amount, subject to the outcome of this petition. This Court had also clarified that it was open to the respondent to invite fresh tenders.

3. The facts giving rise to this petition, broadly stated, are as under:

3.1 The respondents issued tender notices in the year 2003-04 for canal earth work in Saurashtra Branch and for Limdi Sub Branch

Canal. The works consisted of constructing earth work structures, service road and concrete lining. Tender notice No.1 was for Sauashtra Branch Canal, which was for Slice No.IV at an estimated cost of Rs.10.90 crores. Tender notice No.6 was for Limdi Sub Branch Canal comprising of different Slices, in this petition, we are concerned with Slice Nos.II and III, for which the petitioner's offers were found to be the lowest. The estimated cost of the concerned tender works and the prices offered by the petitioner, which were found to be the lowest, are set out in the following Chart:

Particulars	**Tender No.1 SBC Slice-IV**	**Tender No.6 Limdi Slice-II**	**Tender No.6 Limdi Slice-III**
Estimated Cost	Rs.10,90,79,000/-	Rs.13,34,00,000/-	Rs.14,06,00,000/-
Offer Price of Petitioner	Rs.6,92,50,074/-	Rs.8,62,62,623/-	Rs.9,30,74,821/-

3.2 As per tender notice No.1, published on 1st March 2004, the last date for submitting the tenders was 3rd April 2004. The petitioner submitted the tender on the said last date. Similarly, tender notice No.6 was published on 29th February 2004 and the last date for submission was 6th April 2004 and the petitioner submitted its tender on the said last date.

3.3 The tender conditions for each tender required the usual Earnest Money Deposits and also prescribed the validity period. Tender condition No.32 in tender notice No.6 read as under (page 22 of the paper book):-

"32.0 TENDER VALIDITY PERIOD:

32.1 The tender for the work shall be valid for period of 120 days from the stipulated date of opening of the tenders. The Tenderer shall not be allowed to withdraw or modify the offer on hos own during the period. If any tenderer withdraws or makes any modification, or addition in the terms and conditions not acceptable to the SSNNL then the SSNNL shall, without prejudice to any right or remedy be at liberty to forfeit in full, the said Earnest Money Deposit absolutely.

32.2 Exceptional circumstances, the employer may solicit the tenderers' consent for an extension of period of validity of the bid. The request and responses there to shall be made through either digitally signed email, or in writing or by telex or telefax. If the tenderer accepts to extend the period of validity, the validity of EMD also be extended accordingly. In case of refusal of bidder for extensions of validity period his EMD shall be returned. Any tenderer granting the request of extension of validity period shall not be permitted to modify his bid."

(emphasis supplied)

Clause Nos.3 and 8 of Tender Notice No.6 contained the following information:

"3.0 (B) SCHEDULE OF E-TENDERING

		Downloading of Tender Document	Upto Dt.6/4/2004 1200 Hrs.
(ii)	(a)	Online submission of technical bid (if applicable) & Schedule-B.	Upto Dt.6/4/2004 12-00 Hrs.
	(b)	Submission of EMD and other documents	From Dt.6/4/2004 12-00 Hrs. to Dt.7/4/2004 18-00 Hrs. in the office of the Executive Engineer, CPC, SSNNL, 6th Floor, Block No.12, New Sachivalaya Complex, Gandhinagar – 382 010.
(III)		Opening of tenders online.. (Technical bid if applicable)	Dtd.9/4/2004 at 9-00 Hrs.”

“8.0 Opening of Tender :

The Technical bid/ (Price bid) of packages will be opened on Dt.9/4/2004 at 9-00 Hrs. on website www.mpez.net/ssnnl as mentioned in para 3.0.B above. Intending bidders or their representative who wish to participate in online tender opening can log on to website www.mepz.net/ssnnl on the due date and time, mark their presence or participate in online tender opening. For more details vendors are requested to refer “Vendor training manual”. Tenderer who wish to remain present at SSNNL premise at time of tender opening can do so. Only one representative of each firm will be allowed to remain present. The price bid of slices will be opened after Nigam's decision of technical bids of packages and opened with packages.”

General Instruction No.9 also provided that:

“c) The offer shall be valid for 120 days from the opening of tenders.”

3.4 While submitting the tender, the party was also required to submit a letter containing certain commitments, one of which was as under (page 26 of the paper book) :-

> "6.0 We agree to abide by this Tender for the period of 180 days from the last date fixed for receiving the same and it shall remain binding upon us and may be accepted at any time before the expiration of that period."
>
> (emphasis supplied)

3.5 Similarly, for tender notice No.1, similar conditions for tender validity period and opening of tenders were incorporated in the tender conditions. To be precise, condition Nos.11 and 12 of Tender Notice No.1 read as under:

> "11.0 **OPENING OF TENDERS (PRICE – BID)**
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> (i) the designated officer of SSNNL, Gandhinagar will open the E-Tender "Part-II Price bids" online on date preintimated by the SSNNL, Gandhinagar to the responsive qualified Bidders in the Committee Room, IIIrd Floor, Block No"12, New Sachivalaya, Gandhinagar. The intending Bidders who have submitted the tenders or their representatives, if they wish may participate in the online tender Opening process and view the Results.
>
> (ii) All the tenders will be opened irrespective of the Online presence of the tenderers."
>
> 12.0 **TENDER VALIDITY PERIOD :**

1.0 The tender for the work shall be valid for a period of 120 days from the stipulated date of opening of the tenders. The tenderer shall not be allowed to withdraw or modify the offer on his own during this period. If any tenderer withdraws or makes any modifications or additions in the terms and Conditions and tender validity period of his tender not acceptable to the SSNNL, then the SSNNL shall, without prejudice to any right or remedy, be at liberty to forfeit in full, the said earnest money absolutely."

2.0 In exceptional circumstances, the employer may solicit the bidder's consent for an extension of the period of validity of the tender. The request and response there to shall be made in writing or by telex or telefax. If a bidder accepts to extend the period of validity, the validity of Earnest Money Deposit (EMD) shall also be extended according to provision of Para No.19.0 of Section-I, Volume One-A. In case of refusal of bidder for extension of validity period his Earnest Money Deposit (EMD) shall be returned. Any bidder granting the request of extension of validity period will not be permitted to modify his/their bid."

4. The undisputed facts are that on 30th July 2004 and on 2nd August 2004, the Executive Engineer, in-charge of the respective project, requested the petitioner to extend the validity period of the two tenders for a further period of 90 days. While making such request, it was specifically stated in letter 30th July 2004 of the Executive Engineer, Saurashtra Branch Canal for Tender Notice

No.1 as under:

> "In this response you have submitted tender document for above work and tender was opened on 9.4.2004 in the office of the Executive Engineer, CPC S.S.N.N. Ltd. 6th floor Block No.12, Gandhinagar and tender is valid up to 8.8.2004 i.e. 120 days after opening of tender. Validity period of tender will be expire on 8.8.2004. Therefore you are requested to extend tender validity period for 90 days i.e. up to 8.11.2004..... "
>
> (emphasis supplied)

Similarly, the Superintending Engineer, Narmada Project Canal Circle No.-7 by his letter dated 2nd August 2004, requested the petitioner to extend the tender validity period for Tender Notice No.1 up to 30.09.2004. By its letters dated 16th August 2004, the petitioner informed the concerned officers, who had written the above letters, that the petitioner was not extending the validity period of the above tenders and requested for refunding Earnest Money Deposits at the earliest.

5. In the meantime, by his letter dated 17th July 2004, the Executive Engineer (CPC) of the Corporation had informed the petitioner as under:

> "With reference to the above subject (constructing Saurashtra Branch Canal and Limdi Branch Canal) and your bid received online in April-2004, it is to inform you that you are qualified for the works for which you have applied.
> The price bids for the above works are to be opened on dtd.

21/7/2004 at 12.00 hrs online on the web site www.mpez.net/ssnnl."

The respondents, therefore, took up stand in their letters dated 18th August 2004 that the tenders were opened on 21st July 2004 and therefore, the validity period of the tender was up to 17th November 2004. The Superintending Engineer, Narmada Project Canal Circle No.-7 also reminded the petitioner to give justification of the rate, called for previously by letter dated 4th August 2004, in which it was stated that the petitioner's rates for the 4 slices in question were lowest, but during evaluation of price bids, it was noticed that rates of most of the items quoted by the petitioner were below the estimated cost by more than 25%. The petitioner was, therefore, requested to give detailed rate analysis for each item and give explanation for quoting such low rates. It appears that the petitioner thereafter declined to extend the validity period of the tender. The Corporation by letters dated 20th October 2004 (Annexure-"L") accepted the petitioner's offers, which were made in the tenders submitted on 3rd/6th April 2004. By reply dated 30th October 2005, submitted through its learned advocate, the petitioner informed the respondents that the validity period of both the tenders submitted by the petitioner had already expired and that thereafter, acceptance of the petitioner's offers beyond the validity period, which was not extended by the petitioner, was illegal. Thereupon, by letter dated 6th November 2004

(Annexure-”O”), the Corporation informed the petitioner that the validity period of the tenders had not expired at the time of acceptance of the tenders and that Security Deposit as per the tender conditions may be paid up. It was also intimated in the said letter that the Bank Guarantees furnished by the petitioner be also extended for further 3 months.

Thereupon, the petitioner moved this Court for a declaration that the acceptance of the petitioner's offers beyond the validity period of the tenders was illegal and the petitioner also prayed for refund of the Earnest Money Deposit and Security Deposits given to the Corporation in the form of Bank Guarantees and Fixed Deposit Receipts earlier.

6. Mr.Raju, learned counsel with Mr.Chetan Pandya for the petitioner has submitted that the tender conditions specifically provided that the validity period was 120 days from the date of opening the tenders and that the date of opening of tenders was specifically stipulated in the tender papers as 8th April 2004 in Tender Notice No.1 and 9th April 2004 in Tender Notice No.6. For both the tender notices, the petitioner's offers were found to be the lowest. It is submitted that since tender validity period of 120 days under Tender Notice No.1 expired on 5th August 2004 and under Tender Notice No.6 on 6th August 2004 and since the petitioner had not agreed to extend the said validity period, the respondents had no right to accept the petitioner's offers beyond the said validity

period. It is submitted that apart from expiry of the validity period of 120 days from the date of opening of tenders, even the validity period of 180 days from the last date of receiving the tenders by the Corporation also expired on 1st October 2004 for Tender Notice No.1 and on 3rd October 2004 for Tender Notice No.6 and therefore also, acceptance of the petitioner's tenders on 19th and 20th October 2004 for tender notice Nos.1 and 6 respectively was illegal.

7. Learned counsel for the petitioner submitted that the validity period of the tender is of utmost importance because a contractor or a businessman cannot be expected to keep his offer outstanding for an indefinite period because of the fluctuations in the market prices of various commodities and services. Hence, once the validity period expired and the petitioner did not accede to the Corporation's request for extension of validity period, the Corporation was bound to refund the Earnest Money Deposit and the Security Deposit given by the petitioner earlier in the form of Fixed Deposit Receipts and Bank Guarantee amounts.

8. On the other hand, Mr.A.D.Oza, learned counsel for the respondent – Corporation has, with his usual vehemence, argued that the tenders in both the cases were opened on 21st July 2007 and therefore, the validity period of 120 days was to expiry on 17th November 2004. Hence, acceptance of the petitioner's offers on 19th and 20th October 2004 respectively was very much within the time limit. Mr.Oza has further submitted that 9th April 2004 was

the date of opening technical bids and that such offers in two bids (technical bid and price bid) were invited only in respect of tender notices where work was estimated to cost more than Rs.15 crores, but none of the tender works in question was to cost more than Rs.15 crores and therefore, in response to tender notice Nos.1 as well as 6, only single bid offers were invited and were received by the Corporation. It is therefore submitted that the question of opening technical bids in such case did not arise on 9th April 2004. Mr.Oza also submitted that condition No.31.2 of the tender conditions provided as under:

> "31.2 The Tender (Price bid) will be opened after Nigam's decision on technical bids of Packages of same work and will be opened with the Package....."

9. Similarly, reliance is placed on condition No.11 for tender notice No.1, wherein it was mentioned that the bidding officer of the Corporation will open E-tender (Part-II price bid) online on date pre-intimated by the Corporation to the respective qualified bidders. It is therefore submitted that the tenders were to be opened on a date to be informed by the Corporation and accordingly, the Corporation had informed the petitioner on 17th July 2004 (Annexure-"D") that the price bids for the works in question will be opened on 21st July 2004 at 12.00 hours online on the concerned website. Mr.Oza has further submitted that the petitioner backed out from his original offers made on 3rd and 6th

April 2004 only after the Corporation called upon the petitioner to justify his rates, which were found to be 25% lower than the estimated cost of the works in question.

It is further vehemently submitted that on account of the petitioner backing out of the said offers, the Corporation had to invite fresh tenders for Slice Nos.2 and 3 combined for the Limdi Sub Branch Canal work. The contract had to be awarded @ Rs.21.36 crores as against combined offer of the petitioner for the same work, which worked out to Rs.17.93 crores, approx. It is therefore submitted that the Corporation suffered substantial loss and prejudice on account of petitioner withdrawing the offers within the tender validity period, which was to expire on 17th November 2004.

10. Having heard the learned counsel for both the parties, we find that in all the tender papers for tender notice No.1, the stipulated date of opening the tender was 8th April 2004 and in all the tender papers relating to tender notice No.6, the stipulated date of opening the tender was 9th April 2004. Hence, the validity period of the tenders submitted by the concerned party began to run from such dates stipulated in the tender papers. Merely because the Corporation took longer time to open tenders on 21th July 2004, as contended by the Corporation, the validity period cannot thus get extended. It is well known that the contractors or business people while submitting their tenders have to take into

account prices of various commodities and services, which may keep fluctuating from time to time and therefore, the validity period of the tender has to be limited up to a specified period. When the tender conditions specifically provided that the date of opening tenders was going to be 8th or 9th April 2004, as the case may be, the petitioner or any other contractor would, therefore, count 120 days validity period from such date.

11. Even letter dated 30th July 2004, sent by a responsible officer of the rank of Executive Engineer, clearly stated that the tender was opened on 9th April 2004 and the tender was valid up to 10th August 2004, i.e. 120 days. After opening of tender validity period of that tender would expire on 8th August 2004. Therefore, the petitioner was requested to extend the validity period for another 90 days, i.e. up to 8th November 2004.

The explanation coming from the respondents that the letter was written to the petitioner by mistake because similar letters were written to other contractors cannot be accepted. As already indicated earlier, 9th April 2004 (in case of tender notice No.6 and 8th April 2004 (in case of tender notice No.1) was the stipulated date of opening the tenders. Similarly, in letter dated 2nd August 2004 also, even the Superintending Engineer had requested the petitioner to extend the tender validity of the bid up to 30th September 2004. After specifically referring to petitioner's offer dated 6th April 2004 for Slice IV for Saurashtra Branch Canal

covered by tender notice No.1, that letter was also specifically addressed to the petitioner and therefore, it cannot be said that these communications were meant for other parties and were inadvertently sent to the petitioner.

12. While receiving the tenders, the Corporation had required the parties to submit an undertaking that the validity period shall be 180 days from the last date of receiving the tenders by the Corporation, which shall be treated as the tender validity period during which the parties cannot withdraw their offers. Even that 180 days validity period expired on 1st October 2004 in case of tender notice No.1 and on 3rd October 2004 in case of tender notice No.6. Admittedly, the respondents had not accepted the petitioner's offers till such date. In fact, acceptance letters were issued by the Corporation on 19th and 20th October 2004 respectively and therefore, the petitioner's tenders submitted on 3rd and 6th April 2004 respectively were accepted beyond the validity period in each case.

13. It is also not possible to accept the submission of Mr.Oza that 8th April 2004 (in tender notice No.1) and 9th April 2004 (in tender notice No.6) were meant only for double bids system, where technical bids are required to be opened first. The relevant column specifically provided as under:

> “Opening of tenders online..... Dtd. 9/4/2004 at 9-00 Hrs.
> (Technical bid if applicable)”

The words, “if applicable” clearly indicate that where the tenders were submitted in double bid system, only technical bids were to be opened on 8 or 9th April 2004, as the case may be. In case of single bid system, 8 or 9th April 2004 was stipulated as the date of opening the tenders and that was the relevant date and not any subsequent date on which the Corporation may actually open the tenders.

14. In view of the above discussion, we have no hesitation in allowing the petition and declaring that acceptance of the petitioner's tenders for Tender Notice Nos.1 nd 6 of 2003-04 after expiry of the validity period of 120 days from the date of opening of tenders and even after expiry of the validity period of 180 days from the last date of receiving the respective tenders was illegal and cannot bind the petitioner.

15. As regards reliefs to be granted, Mr.Oza for the respondent – Corporation states that the interim order passed by the Court on 6th December 2004 was already complied with at the relevant time and one-half of the amount required to be refunded to the petitioner was refunded. Mr.Oza further submits that no further relief may be granted to the petitioner because rates quoted by the petitioner at the relevant time in April 2004 in response to tender notices Nos.1 and 6 were unrealistically low and it was only after the Corporation called upon the petitioner to explain how the rates quoted by the petitioner were below the estimated cost by more than 25% that

the petitioner decided to back out. It is also submitted that on account of this unreasonable stand of the petitioner, the Corporation had to issue fresh tender notices and ultimately, the contract has been awarded to another party for Limdi Slices Nos.II and III at price of Rs.21.36 crores against combined price of Rs.17.93 crores, which the petitioner had offered for the same work.

16. In view of the nature of the controversy which is the subject matter of the present petition, we are not required to go into the question whether the petitioner had quoted unreasonably low rates. If the respondent – corporation took longer time to open the tenders and to evaluate them, the petitioner cannot be denied the relief of refund of Earnest Money Deposit to which it became entitled upon expiry of validity period of not only 120 days from the date of opening the tenders but even the validity period of 180 days from the last date of receiving the tenders by the Corporation. Even otherwise, the contract awarded by the Corporation to another party for Limdi Slices Nos.II and III is for a combined price of Rs.21.36 crores as against the estimated cost of Rs.27.40 crores, which estimate was made by the respondent in the year 2003-04.

17. In view of the above discussion, the petition is allowed. The respondents are directed to refund the amounts of Earnest Money Deposit, whether in the form of Fixed Deposits or Bank Guarantees. The respondents shall also not encash the Bank Guarantees given

by the petitioner earlier and lying with the Corporation and return the same to the petitioner. This direction shall be complied with on or before 31st January 2008.

It is clarified that the validity period of the Bank Guarantees given earlier shall stand extended till 31st January 2008.

18. Rule is made absolute in the above terms. In the facts and circumstances of the case, the parties shall bear their own costs.

Direct service is permitted.

(M.S.SHAH, J.)

(RAVI R.TRIPATHI, J.)

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